Attention is drawn to the order prohibiting publication of certain information (refer paragraphs 2, 11 and 16)

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 106
3003932

	BETWEEN	THE VICE-CHANCELLOR OF VICTORIA UNIVERSITY OF WELLINGTON Applicant
	A N D	CAROLINE SAWYER Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Mary Scholtens QC and Geoff Davenport, Counsel for the applicant Kevin Smith, Counsel for the respondent
Evidence and submissions:	Affidavits filed by the applicant on 11 July 2017 and 31 August 2017 Submissions filed by the applicant on 31 August 2017 Affirmation of Caroline Sawyer filed on 15 August 2017 Submissions filed by the respondent on 14 September 2017
Investigation Meeting:	On the papers
Date of Determination:	01 November 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The respondent, Caroline Sawyer is to pay a penalty in the sum of $8,500 within 28 days, in accordance with the orders set out in para [65] of this determination.

B. Costs are reserved.

Background facts

[1] On 21 December 2016, the Authority determined[1] that the record of settlement entered into between the applicant, the Vice-Chancellor of Victoria University of Wellington (the University) and the respondent, Caroline Sawyer, on 24 July 2014 (the ROS) following mediation provided by the Ministry of Business, Innovation and Employment (MBIE) to be final and binding on the parties pursuant to s.149 of the Employment Relations Act 2000 (the Act).

[2] The Authority made an order under Schedule 2, clause 10(1) of the Act that the confidential details of the ROS be subject to a permanent non – publication order.

[3] The Authority's determination dealt with each of the reasons advanced by Dr Sawyer during the Authority's investigation in support of her claim that the ROS was a "nullity and therefore void". Reasons advanced by Dr Sawyer included the following:

(i) that Dr Sawyer's employer, the University did not authorise the ROS;

(ii) the individual who signed the ROS was not authorised to do so on behalf of the University;

(iii) there was no consideration for the ROS;

(iv) the ROS was reached as the result of improper pressure on Dr Sawyer;

(v) whether the terms of the ROS were final and binding on the parties.

[4] Under each of the above heads, the Authority found in favour of the University.

[5] Dr Sawyer has subsequently filed a challenge to the Authority's determination regarding the validity of the ROS[2].

Application by the University for compliance and penalties against Dr Sawyer

[6] Following the Authority's determination upholding the ROS, the University claimed that Dr Sawyer had engaged in behaviour in breach of the ROS, including sending emails containing disparaging comments.

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1 [2016] NZERA Wellington 158.

2 EmpC 7-2017 Sawyer v The Vice-Chancellor, Victoria University of Wellington.

[7] On 21 February 2017, the University filed a statement of problem in the Authority seeking an order for compliance in respect of the ROS and penalties. The University sought urgency.

Consent determination

[8] Before the respondent filed a statement in reply to the statement of problem, there were discussions between Counsel for the respective parties.

[9] On 3 March 2017, Mr Greg Lloyd who, at the time, was Counsel for Dr Sawyer sent an email to the Authority and to Geoff Davenport, Counsel for the University. The email stated:

> I act for the respondent, Caroline Sawyer. My instructions are that Ms Sawyer does not oppose the applicant's application for a compliance order. Accordingly, if the applicant and the Authority are agreeable, a compliance order may be issued by consent. In relation to the second part of the applicant's application (penalties) I am still in the process of taking full instructions.

[10] In its consent determination of 3 March 2017[3] the Authority found that:

> [4] On or about 19 and 20 January 2017 and on or about 17 February 2017, Dr Sawyer engaged in breaches of the ROS by sending emails in breach of clause 12 of the ROS.

[11] The Authority made orders that:

- Dr Sawyer had breached the terms of the ROS;
- Dr Sawyer was ordered to comply with all the terms of the ROS; and
- The confidential details of the ROS were to remain subject to a permanent non – publication order.

[12] The determination left for future investigation a claim for penalties in respect of Dr Sawyer's breaches of the ROS, as provided for by s. 149(4) and s. 135 of the Act.

No challenge filed to consent determination

[13] Dr Sawyer failed to file a challenge to the consent determination of 3 March 2017 within the time permitted in s.179 of the Act. On 30 June 2017, she applied to the Court

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[3] [2017] NZERA Wellington 14.

for leave to extend the time within which she could challenge the determination. This matter has yet to be dealt with[4].

Stay of proceedings filed in respect of consent determination

[14] On 25 July 2017, Dr Sawyer applied for a stay of proceedings relating to the Authority's consent determination. The application was dismissed as the Court formed the view that it did not have jurisdiction to entertain the application for a stay[5].

[15] Accordingly, the consent determination of 3 March 2017 stands. This current determination deals with the second part of the University's application to the Authority, that penalties be ordered in respect of the breaches by Dr Sawyer of the ROS.

[16] This determination has anonymised the individuals and the disparaging comments made by Dr Sawyer in breach of the ROS. These details are subject to a permanent non-publication order.

Penalties application

[17] For completeness, clause 12 of the ROS states:

> Both parties agree that neither party will make any disparaging comments about the other. The University will request that **Mr X** and **Mr Y** not speak in disparaging terms of Caroline Sawyer, likewise Caroline Sawyer will not speak in disparaging terms of **Mr X and Mr Y**.

[18] There were 5 emails sent in total by Dr Sawyer on 19 and 20 January 2017 and on 17 February 2017, which, by consent, were found to have breached clause 12 of the ROS.

[19] The University seeks a penalty of $10,000 in respect of each breach. A total of $50,000 is sought against Dr Sawyer. The statement in reply filed by Dr Sawyer does not deal with the matter of penalties.

Affidavits filed on behalf of the University

[20] In support of its application for penalties, the University has filed two affidavits from Ms Kathryn McGrath, the Vice-Provost (Research) at the University; an affidavit from Mr Simon Johnson, the University's General Counsel; and an affidavit from Mr Robert Miller, Deputy Director HR at the University.

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4 EmpC 144-2017 *Sawyer* v *The Vice-Chancellor*, Victoria University of Wellington.

5 *Caroline Sawyer* v *The Vice-Chancellor of Victoria University Wellington* NZempC Wellington 2017 NZEmpC 111 [12 September 2017].

Affidavit of Mr Robert Miller dated 11 July 2017

[21] Mr Miller's affidavit sets out the factual background leading up to the signing of the ROS by the parties on 24 July 2014 and highlighting the fact that Dr Sawyer was legally represented by senior counsel during this time and at the date of the mediation and the signing of the ROS. Mr Miller also gives evidence of communications by Dr Sawyer following the ROS which he says amounted to a breach of the ROS by Dr Sawyer. The University reminded Dr Sawyer of her obligations under the ROS. Following the Authority's determination of 21 December 2016[6] upholding the validity of the ROS and despite reminders to Dr Sawyer about breaching the ROS, Mr Miller says Dr Sawyer continued to breach the ROS by sending emails which were disparaging of staff of the University.

Affidavits of Ms Kathryn McGrath dated 11 July 2017 and 31 August 2017

[22] Ms McGrath has given evidence that, although she is employed at the University, she did not have professional dealings with Dr Sawyer while she was at the University. Ms McGrath says their association was through a social book group.

[23] Ms McGrath says she became aware through news reports in January 2017, that the Authority had determined[7] that Dr Sawyer had not been successful in her claim against the University that the ROS had been signed by her under "duress".

[24] Two days after the publication of the Authority's findings, Ms McGrath says she was sent an email by Dr Sawyer dated Thursday 19 January 2017 at 12.39 am. This is the first email which the University claims was a breach by Dr Sawyer of the ROS and which was cited by it in its application for a compliance order on 21 February 2017.

First email by Dr Sawyer to Ms McGrath dated Thursday, 19 January 2017 at 12.39 am

[25] In her email to Ms McGrath, Dr Sawyer refers to Mr X and Mr Y and makes various accusations about each. Accusations include of dishonesty, of professional incapability and of professional impropriety.

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6 ibid footnote 1 above.

7 ibid footnote 1

Second email by Dr Sawyer to Ms McGrath on 20 January 2017 at 10.17 am

[26] This was an email from Dr Sawyer to various members of the book club which included Ms McGrath. The email is highly critical of the Authority's determination finding that the ROS was not a nullity and was binding on Dr Sawyer. Dr Sawyer then criticises the Authority member who investigated Dr Sawyer's claims and the procedure utilised by her.

[27] The email refers to Mr Y and makes accusations of dishonesty and professional impropriety and slurs his character.

Third email by Dr Sawyer to Ms McGrath dated 20 January 2017 at 1.48 pm

[28] This email attaches documentation from Dr Sawyer in which she refers to both Mr X and Mr Y and accuses them of dishonesty and of falsifying records.

Fourth email by Dr Sawyer to Professor Claudia Geiringer dated 17 February 2017 at 9.27am

[29] In one of the affidavits filed on behalf of the University, evidence is given of communications by Dr Sawyer during 2015 and 2016 prior to the penalties application. The deponent of the affidavit states that the communications from Dr Sawyer contained assertions which lacked any basis. Evidence to the Authority was that on those occasions Dr Sawyer was reminded of the ROS and the University's view that the communications were in breach.

[30] At para 11 of the affidavit, the deponent says:

> I am aware that VUW (the University) is not seeking penalties against Dr Sawyer for these particular breaches by her during 2015 and 2016. However, I am mentioning [the] emails to Dr Sawyer because they demonstrate the steps that VUW took prior to the present action to make her aware of the final and binding nature of the ROS that had been agreed with her and that she was required to comply with her obligations under that ROS.

[31] In her email to Professor Claudia Geiringer Dr Sawyer refers to Mr Z and accuses him of fraud.

[32] There were other statements in the email aimed at the characters of both Mr X and Mr Y.

Fifth email by Dr Sawyer to Doctor Nicole Moreham dated 17 February 2017 at 9.46 am

[33] This email accuses Mr X and Mr Y of blackmail.

Affirmation of Dr Sawyer dated 15 August 2017

[34] Dr Sawyer's evidence is largely a submission in support of her view that the ROS is not enforceable. At paragraph 18 of her affirmation, Dr Sawyer says the current application for penalties should not be entertained by the Authority because it:

> …is impermissible to the Authority by virtue of the Protected Disclosures Act 2000 (the Act)… and the obligations under the United Nations Convention Against Corruption…..This is because what the Applicant claims is "disparagement" is also reporting within the meaning of the Act of "serious wrongdoing" against me by making and using an incorrect HR file against me, and of a failure by the Applicant to run his University, or part of it, in accordance with the obligations on the Chief Executives of public sector entities…" At paragraph 65 of her affirmation, Dr Sawyer claims immunity to proceedings "…in relation to protected disclosures by virtue of the Act… and no penalties should be made.

[35] This seems to be a submission that emails 1 to 5 exhibited to the affidavits filed on behalf of the University do not amount to disparagement but are rather the reporting of serious misconduct by Dr Sawyer pursuant to the Protected Disclosures Act 2000 and are therefore protected and provide immunity from penalty.

[36] The submissions filed by Dr Sawyer on 14 September 2017, refer to matters which are not before me for determination. Dr Sawyer claims the ROS "remains void". This matter was dealt with by the Authority in its determination of 21 December 2016[8] and has been challenged to the Employment Court.

[37] Dr Sawyer, through Counsel instructed by her at the time, agreed by consent to the issue of a compliance order in respect of the ROS. A consent determination issued on 3 March 2017 determined that, by sending the emails on 19 and 20 January 2017 and 17 February 2017, Dr Sawyer engaged in breaches of the ROS. Dr Sawyer was ordered to comply with the ROS. That determination has not been challenged. Penalties remain to be considered.

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8 *ibid* 1.

The law

Should a penalty be imposed?

[38] Section 149(4) of the Act allows the Authority to impose a penalty on a person who breaches a settlement agreement under the Act; s.135(2)(a) provides that an individual in breach of the Act is liable to a penalty of up to $10,000 for each breach. Each time Dr Sawyer breached the ROS she became potentially liable to a penalty being imposed on her for each discrete breach. Dr Sawyer is potentially liable to penalties of $50,000 in respect of her breaches of the ROS.

[39] Section 133A of the Act sets out a number of factors the Authority should consider when determining penalties. These factors are:

- the object of the Act stated in s.3;
- the nature and extent of the breach or involvement in the breach;
- whether the breach was intentional, inadvertent, or negligent;
- the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach, or the person involved in the breach, because of the breach or involvement in the breach;
- whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- the circumstances in which the breach, or involvement in the breach took place, including the vulnerability of the employee;
- whether the person in breach, or involved in the breach, has previously been found to have engaged in similar conduct.

[40] The Employment Court in *Borsboom (Labour Inspector)* v *Preet PVT Limited* and *Warrington Discount Tobacco Limited*[9] identified the objectives of penalties in employment law to include; punishment, deterrence, both specific and general,

[9] [2016] NZEmpC 149.

compensation of a victim of a breach and the elimination of unfair competition in business. The final objective is not relevant in the current context.

[41] The Employment Court in *David Lumsden* v *Sky City Management Limited*[10] considered penalties for a breach of a settlement agreement under s.149 of the Act. The Court identified two further factors in addition to those specified by s.133A of the Act, as relevant to an assessment of penalties, namely, the need for general and particular deterrence and the desirability of broad consistency with other penalties in similar cases. At para [66] of the judgment, the court stated, relevantly for the current case:

> There is also a broader public interest in deterring parties from reneging on s149 settlement agreements, and of underscoring the importance of compliance, however inconvenient that might prove to be.

[42] I have taken these factors into account when assessing penalties.

[43] It is clear that s.149(4) of the Act has, as its purpose, punishment for breaches of legally binding agreements, deterrence to prevent repetition for such breaches and possible compensation to the victim of the breach.

[44] In considering whether a penalty should be imposed, I take into account the evidence contained in the affidavits filed by the parties.

[45] I am of a view that this is case in which penalties should be imposed. There is a clear need for punishment to signal the Authority's disapproval and to act as a disincentive for others who may be inclined to breach their record of settlement obligations.

[46] Mr Miller, the Deputy Director HR at the University, sets out in his affidavit the reasons why it was important to the University that there be a non-disparagement clause in the ROS and that the ROS was expressed to be in full and final settlement of all matters between Dr Sawyer and the University arising out of their employment relationship.

[47] Mr Miller says the non-disparagement clause was to expressly cover Mr X and Mr Y and this was included in clause 12 of the ROS. Mr Miller says that following the signing of the ROS, Dr Sawyer repeatedly breached the non-disparagement obligation and was warned by the University about the consequences of doing so.

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10 [2017] NZEmpC 30.

[48] Mr Johnson, the University's General Counsel, also gave evidence of the importance of the confidentiality and non-disparagement provisions in the ROS and of the breaches by Dr Sawyer after signing it. Mr Johnson attached evidence to his affidavit of communications to Dr Sawyer requesting that she comply with the ROS and of the University's concern at her continued intentional breach of the ROS.

[49] In my view, Dr Sawyer was clearly on notice that there were likely to be adverse consequences for her if she did not adhere to her obligations under the ROS. Despite warnings of likely consequences, in January and February 2017, Dr Sawyer sent five emails which were disparaging of Messrs X, Y, Z and of others employed at the University.

Amount of penalty to be imposed

[50] When deciding the amount of the penalty to be imposed upon Dr Sawyer, the Authority is to follow the four stage approach set out by the court in *Preet*[11].

[51] In *Lumsden*, the Employment court considered the quantum of penalties awarded in various cases by the Authority[12]. The Court imposed a global penalty of $6000 against Sky City for breaches of a settlement agreement which it "cynically agreed to terms it had no intention of keeping". The penalty was uplifted to $7500 to take into account the fact Sky City attempted to mask from the court "the full extent of its breach"[13].

Step 1 - the nature and extent of the breach

[52] I find that there were five breaches of the ROS which occurred as a result of the emails sent by Dr Sawyer in January and February 2017. As found in the consent determination, Dr Sawyer engaged in breaches of the non-disparagement clause of the ROS by disparaging the University, Mr X and Mr Y in the emails of 19 and 20 January 2017 and 17 February 2017. Mr Z was also the subject of disparagement.

[53] For the purposes of assessing penalties, I consider that Dr Sawyer engaged in five breaches of the ROS which were drawn to the Authority's attention in these proceedings. The maximum potential penalties that may be imposed for Dr Sawyer's breaches of the ROS are $50,000 (5 x $10,000).

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11 ibid fn 9
12 ibid fn 10 at paras [62]-[65]
13 ibid fn 10 at para [67]

Step 2 - Assessment of severity of breaches

[54] The first email from Dr Sawyer was sent to Ms McGrath only. The second email was sent by Dr Sawyer to members of the book club including Ms McGrath. The recipients numbered eight people in total. The third email was sent to Ms McGrath alone, the fourth email was sent to Professor Claudia Geiringer and the fifth email to Doctor Nicole Moreham. There was no evidence that the emails had been circulated more widely than that group of members of the book club and colleagues at the University. The emails were viewed by a limited number of people who were already aware of the issues between the parties, albeit perhaps not in the detail contained in the emails.

[55] I consider the breaches by Dr Sawyer were intentional. Clause 12 of the ROS was very clear. Further, Dr Sawyer was made aware, when she sent emails the University thought may be in breach of the non-disparagement clause, of the consequences if she continued to do so. I also agree with the submission made by Counsel for the University that the breaches of the ROS, which are the subject of this penalties claim, were committed by Dr Sawyer after the Authority had issued its determination[14] confirming that the ROS was final, binding and enforceable on her.

[56] In terms of mitigating circumstances, Dr Sawyer is embroiled in various proceedings in the employment jurisdiction with the University and she is harbouring strong views about the way in which she feels she has been treated by the University. However, Dr Sawyer has not expressed remorse or provided any indication that she understands the seriousness of breaching the ROS or the potential harm her breaches have had on Mr X and Mr Y who were specifically named in clause 12 of the ROS as individuals to whom the non-disparagement clause applied. Dr Sawyer does not accept the consent determination even though, through Counsel, she agreed to its terms.

[57] I consider the fact that the ROS clearly spelt out that there was not to be disparagement of the University or of particular individuals, both of whom were subsequently disparaged by Dr Sawyer, are aggravating features of Dr Sawyer's breaches. These breaches were not trivial or inadvertent. Dr Sawyer excuses her conduct in her affirmation by saying that the disparaging statements made by her were protected disclosures under the Protected Disclosures Act 2000.

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[14] *Ibid* 1.

[58] The Protected Disclosures Act 2000 has specific processes and procedures to be followed when making a protected disclosure, the purpose of which is to facilitate the disclosure and investigation of matters of "serious wrongdoing in or by an organisation"[15]. I accept the submission made by Counsel for the University that to suggest that members of a book club could be appropriate recipients of any protected disclosure is disingenuous.

Step 3 – Means and ability to pay

[59] In terms of assessing Dr Sawyer's ability to pay, she has not provided any evidence regarding her financial means. In general terms, the imposition of a penalty is likely to impose some hardship on a party, so some hardship is an expected consequence of a party's wrongdoing. There was insufficient evidence available to enable the Authority to determine that any penalty should be reduced on the grounds of Dr Sawyer's inability to pay.

Step 4 – Proportionality

[60] Penalties imposed for breaches of non-disparagement and confidentiality provisions in records of settlement range between $250 to $7,500.

[61] Counsel for the University seeks penalties of $10,000 per email modified to $7,500 per email if the Authority considers that to be an appropriate course. This would amount respectively to $50,000 and $37,500 in total.

[62] I have adopted the totality approach to penalties and consider one overall penalty instead of discrete penalties for each individual breach to be appropriate. This is consistent with other Authority determinations. The email communications which are the subject of this penalties application occurred within a month of each other. The emails were sent to a limited audience. I consider one penalty of $8,500 to be appropriate.

[63] Penalties are normally paid to the Crown and not to an applicant who has made a penalty claim. However, Counsel for the University has asked that some or all of the penalties imposed be paid to the University and to Messrs X, Y and Z. I consider any payments to be made should be to Mr X and Mr Y who were expressly named in the ROS as individuals not to be disparaged by Dr Sawyer.

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15 s.5 of the Protected Disclosures Act 2000

[64] Section 136(2) of the Act enables the Authority to award some or all of the penalty imposed to any person instead of the Crown. I consider it appropriate to do so in this case.

[65] Within 28 days of the date of this determination, Dr Sawyer is ordered to pay:

(a) The sum of $3750 each to the University for the use of Mr X and Mr Y;

(b) The sum of $1,000 to the Authority, which will then be paid by the Authority into a Crown bank account.

Costs

[66] The University has fourteen days from the date of this determination to file a memorandum as to costs. Dr Sawyer has fourteen days from receipt of the University's memorandum as to costs to file her memorandum as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority